STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD D. BRAXTON,

Defendant-Appellant.

UNPUBLISHED
July 8, 2003

No. 232830
Wayne Circuit Court
LC No. 00-004785

Before: Cooper, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction and a consecutive two-year prison term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from an incident following a street argument in Detroit. A group of men had gathered on a Detroit street and were engaged in peaceful activities. A sudden argument erupted, however, and Ainslie Woodward drove away from the area in his van. Three individuals followed him in a blue car. After Woodward stopped at an intersection, the occupants of the blue car began shooting into Woodward's van. Woodward died from eleven gunshot wounds. Defendant gave a statement to the police in which he described the argument and admitted that he and Jamuan Stone began shooting because he thought Woodward was going to stick a gun out the van's window. No weapon was found in the van, and no one saw anything removed from the van. At trial, defendant presented an alibi defense.

I. Voluntariness of Defendant's Custodial Statement

Defendant argues that the trial court should have suppressed his custodial statement because he was not advised of his *Miranda*[1] rights. He also argues that the statement was involuntary because it was induced by an unfulfilled promise of leniency. Specifically, he asserts that he was told he would not be charged with first-degree murder if he confessed to the

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

killing under circumstances that would support a theory of self-defense. The trial court denied defendant's motion to suppress following a *Walker*[2] hearing.

The police investigator who took defendant's statement testified that she had defendant read the advice of rights form to her, and that defendant initialed each right. After advising defendant of his rights, the investigator took a 5-1/2 page statement, which defendant signed in numerous places. The investigator testified that defendant had no difficulty reading or understanding his rights, he did not appear to be under the influence of any intoxicants, he seemed to understand her questions and comments, and she had no trouble understanding defendant. The investigator denied making any promises or threats, and denied abusing defendant physically or verbally.

In contrast, defendant testified that the investigator told him that he would go to prison for life if he did not cooperate. Defendant acknowledged that his initials were on the advice of rights form, but claimed that he was advised of his rights only after giving his statement.

The trial court found that defendant's version lacked credibility ("I don't believe a word he said"). The trial court was in a superior position to assess the credibility of the two witnesses. Deferring to the trial court's resolution of this credibility dispute, we find no clear error in the court's decision denying defendant's motion to suppress. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

II. Trial References to Defendant's Incarceration

Defendant next argues that he was prejudiced by references to his incarceration during trial. A prosecution witness testified that she had visited codefendant Stone in jail. When overruling codefendant Stone's objection to this testimony, the trial court indicated, in the jury's presence, that "[e]verybody knows that both of these gentlemen are being held." Defendant objected to the court's comment.

References to a defendant's prior incarceration are considered highly prejudicial. See *People v Greenway*, 365 Mich 547; 114 NW2d 188 (1962); *People v Spencer*, 130 Mich App 527, 536-537; 343 NW2d 607 (1983). In an analogous context, references or factors pointing to a defendant's current incarceration, such as by requiring a defendant to wear jail clothing, are also considered prejudicial, inasmuch as they undermine the defendant's presumption of innocence. *People v Dunn*, 446 Mich 409, 425 n 26; 521 NW2d 255 (1994).

In *People v Shaw*, 381 Mich 467, 474; 164 NW2d 7 (1969), our Supreme Court quoted with approval the following from 21 Am Jur 2d, Criminal Law, § 239, in holding that criminal defendants are entitled to wear civilian clothes upon timely request before trial:

> Since the defendant, pending and during his trial, is still presumed innocent, he is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man, except as the necessary safety and decorum of the court may otherwise require. He is therefore entitled to

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

> wear civilian clothes rather than prison clothing at his trial. It is improper to bring him into the presence of the jury which is to try him, or the venire from which his trial will be drawn, clothed as a convict.

Here, the trial court essentially took the view that a defendant who is charged with murder, by virtue of that charge, is entitled to a lesser presumption of innocence than other criminal defendants. We do not share the trial court's view that "everyone knows" that all murder defendants are incarcerated before trial. Apart from being factually incorrect, this view would open the door to ranking the rights of defendants based solely on perceived public perceptions of the criminal justice system.

The prosecutor argues that defendant contributed to any error in this regard by asking a witness about defendant's incarceration. However, defense counsel posed the question only after the trial court made its offensive remark. As our Supreme Court observed in *Greenway*, *supra* at 550, counsel's attempt to mitigate the harm caused by the trial court's remark does not erase the damage done by the improper reference.

Nonetheless, while we are sympathetic to defendant's claim, we are not persuaded that defendant has demonstrated actual prejudice stemming from the court's isolated remark. The court's error does not require reversal.

III. Photographic Evidence

Defendant argues that the trial court erred by admitting a photograph of the interior of the van. We disagree with defendant's claim that the photo was unduly prejudicial under MRE 403. Although the photo depicted broken glass and blood, it did not depict the decedent's body. The photo was offered to support the prosecutor's theory that the shooting was conducted from both sides of the van and was relevant to the issue of premeditation. It was not unduly inflammatory or designed to arouse the passions or prejudices of the jury. *People v Hoffman*, 205 Mich App 1, 18-19; 518 NW2d 817 (1994). The court did not abuse its discretion by allowing it as evidence.

IV. Defendant's Peremptory Challenges

Defendant next argues that the trial court improperly engaged in the "struck-jury method" of jury selection, contrary to *People v Miller*, 411 Mich 321, 326; 307 NW2d 335 (1981). During jury selection, defendant exercised a peremptory challenge. The court excused the prospective juror and asked defense counsel if he wanted to excuse "anyone else?" Defendant then exercised a second peremptory challenge to excuse another juror. Two new prospective jurors were selected to occupy the vacated seats, and jury selection continued. Defendant did not object to this procedure.

Later, defendant exercised a third peremptory challenge. The court seated a new prospective juror without asking defendant to exercise more challenges. After the prosecutor subsequently passed on peremptory challenges, defendant simultaneously excused two more prospective jurors with peremptory challenges. The court did not direct defendant to exercise multiple challenges at that time. Just before jury selection concluded, defendant exercised a sixth peremptory challenge, and the court again did not invite defendant to exercise multiple

challenges. When the final jury was selected, defendant still had peremptory challenges remaining.

MCR 2.511(F), made applicable to criminal trials through MCR 6.412(A), addresses the method of jury selection:

> After the jurors have been seated in the jurors' box and a challenge for cause is sustained or a peremptory challenge exercised, another juror must be selected and examined before further challenges are made. This juror is subject to challenge as are other jurors.

Although the court erred by once suggesting that defendant exercise multiple peremptory challenges, the error does not warrant reversal. The court made the request only once (prompting defendant's first and second peremptory challenges). When defendant exercised a third peremptory challenge, the court did not make a similar request. When defendant exercised his fourth and fifth challenges, he coupled those challenges without prompting from the bench. And, when defendant exercised his sixth challenge, the court again did not request multiple challenges.

In *Miller*, the trial court directed in a pretrial order that it would employ the "struck jury" method, contrary to the predecessor to MCR 2.511(F). The defendant's objection to this procedure was overruled. *Miller, supra* at 323. The Supreme Court reversed, stating:

> A defendant is entitled to have the jury selected as provided by the rule. Where, as here, a selection procedure is challenged before the process begins, the failure to follow the procedure prescribed in the rule requires reversal. The "struck jury method" or any system patterned thereafter is disapproved and may not be used in the future. [*Id.* at 326.]

Here, unlike in *Miller*, defendant did not challenge the isolated use of the "struck jury" method. Thus, the precondition of *Miller* has not been satisfied. Indeed, defendant even used the method on his own volition, thereby contributing to any error. See *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999) (a defendant waives review of an error to which he contributed by plan or negligence).

Even if we were to review this unpreserved issue under the plain error test of *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), it would not warrant reversal. Under *Carines*, an unpreserved claim of error may lead to reversal only if three requirements are met:

> 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. [*Id.* (citation omitted).]

After a defendant establishes these three requirements, an appellate court must exercise discretion whether to reverse:

> Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Id.*]

Here, because the use of multiple peremptory challenges was isolated, defendant contributed to any error, and defendant had peremptory challenges remaining when a jury was finally seated, he has not demonstrated that any irregularity affected his substantial rights. *Id.*

V. "Intent" Jury Instruction

Defendant argues that the trial court erred when it crafted its own second-degree murder instruction rather than using the standard jury instruction. See CJI2d 16.5.[3] The court instructed the jury as follows:

> The statute states that all murder which is not murder in the first degree is murder in the second degree.
>
> Murder in the second degree and murder in the first degree is [*sic*] the same crime except that the element of premeditation is lacking.
>
> Murder in the second degree is defined as unlawful killing of one person by another under circumstances which do not mitigate or justify the offense, and it is done without premeditation and deliberation.
>
> Now, the person who – the perpetrator must either intend to kill or he intends to do great bodily harm, *or he does an act with total disregard that the likely consequences of that act would be the cause of death or great bodily harm.*

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[3] CJI2d 16.5 provides:

> (1) You may also consider the lesser charge of second-degree murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (2) First, that the defendant caused the death of [name deceased], that is, that [name deceased] died as a result of [state alleged act causing death].
>
> (3) Second, that the defendant had one of these three states of mind: [he/she] intended to kill, or [he/she] intended to do great bodily harm to [name deceased], *or [he/she] knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of [his/her] actions.*
>
> (4) Third, that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime. [Emphasis added.]

> So the difference between murder in the first degree and murder in the second degree is that murder in the first degree you intend to kill, and murder in the second degree the perpetrator could either intend to kill or you could intend to do great bodily harm *or you just do an act which [sic] without regards that [sic] the consequences, the likely consequences would be to cause death or great bodily harm.*
>
> So you don't have to specifically intend to kill, but you can intend to do bodily harm *or do an act in total disregard that the likelihood of that act would be the cause of death or great bodily harm*, and it is not done with premeditation. It is something that is done when the perpetrator has not deliberated or premeditated actions that they're going to take. [Emphasis added.]

On appeal, defendant challenges the court's recitation of the third type of "state of mind" that can support a second-degree murder conviction. In particular, he argues that the trial court improperly instructed the jury that it could find guilt based on disregard of the consequences of the act when the standard instruction requires *knowledge* that death or great bodily harm would be the likely result.

Because defendant did not object to the court's instruction, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, *supra*; *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). We find no plain error. In *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998), malice was defined as

> the intent to kill, the intent to cause great bodily harm, *or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.* [Emphasis added.]

We note at the outset that a trial court is not required to use the standard jury instructions. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985); *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992). Here, we note that CJI2d 16.5 states the three requisite forms of intent only once, and with clarity. The trial court, however, gave an instruction that presented the three forms of intent three times, each time using slightly different language. This case serves as a cogent example of the benefits of standard instructions. The use of standard instructions promotes continuity of style and endorses instructions tailored to the vocabularies and experiences of everyday jurors.

Nonetheless, although the trial court's instruction varied from the standard jury instruction, it was consistent with *Goecke*, *supra*. See also *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001). Accordingly, we find no plain error.

VI. "Reasonable Doubt" and "Duty To Convict" Jury Instructions

Next, in a two-part argument, defendant argues that the trial court improperly defined "reasonable doubt" and instructed the jury that it had a duty to convict him if the evidence supported conviction. Defendant did not object to either instruction. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra*.

The court defined "reasonable doubt" as follows:

> Now, I think I briefly explained to you about the meaning of reasonable doubt. Reasonable doubt is defined as exactly what the word specified. Doubt that is based on reason, on common sense. There is nothing mysterious about any of the words. It's English language.
>
> And a reasonable doubt means a doubt that's based on reason and common sense. A fair, honest and reasonable doubt. *A doubt that you should have a – that you have a reason for having.*
>
> Now, reasonable doubt is not merely an imaginary, ficticious [*sic*] or flimsy doubt. It's not a hunch or a feeling or a possibility of innocence. It's a fair, honest and reasonable doubt. A doubt that's based on reason and common sense. And you decide that by applying your everyday experience and common sense to help you decide if such a reasonable doubt exists[s]. [Emphasis added.]

The foregoing instruction was preceded by the court's instruction on defendant's alibi defense, wherein the court instructed that "if you have a reasonable doubt that he was there, then find him not guilty. If you have no such reasonable doubt, then *it is your duty to bring back a verdict of guilty*" (emphasis added). Following the "reasonable doubt" instruction, the court further stated "[i]f you have a reasonable doubt, it is your duty to acquit the defendant. If you do not have a reasonable doubt, you should – *it's your duty to convict* the defendant" (emphasis added).

The trial court failed to distinguish between a reasonable doubt "based on reason and common sense," as the standard instruction provides, see CJI2d 3.2, and the requirement that a juror have "*a* reason" before concluding that he or she has a reasonable doubt as to the defendant's guilt. In its proper use, a decision based on "reason" involves "sound thought or judgment" or "normal mental powers." Webster's New World Dictionary, Second College Edition, p 1183. "*A* reason," though, is defined differently. "A reason" means "an explanation or justification of an act, idea, etc.," or "a cause or motive." *Id.* When a court instructs a jury to base its decision "on reason," it properly tells the jury to use sound thought or judgment, as opposed to basing a decision on prejudice or whim. When a court instructs a jury to base its decision "on *a* reason," however, it calls upon the jury to justify its decision. Such an instruction improperly shifts the burden of proof to the defendant by requiring the jurors to have a reason to doubt the defendant's guilt. See *People v Jackson*, 167 Mich App 388, 391; 421 NW2d 697 (1988) ("[a]n instruction defining reasonable doubt may not shift the burden of proof by requiring the jurors to have *a reason* to doubt the defendant's guilt") (emphasis added); *People v Foster*, 175 Mich App 311, 316, 319; 437 NW2d 395 (1989), overruled on other grounds in *People v Fields*, 450 Mich 94, 115 n 24; 538 NW2d 356 (1995) (prosecutor committed error requiring reversal when he argued that jurors must have "a reason" for their doubt).[4]

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[4] Contra: In *People v Lee*, 212 Mich App 228, 254; 537 NW2d 233 (1995), this Court held that it was not error requiring reversal for a prosecutor to argue that a juror must have a reason for any doubt. The Court noted, however, that the trial court gave an appropriate instruction defining
(continued…)

Similarly, the court's instruction that the jury had a duty to convict defendant if it failed to find reasonable doubt is also problematic. The standard jury instruction wisely avoids stating that a jury ever has a duty to convict a defendant. Rather, it states only when the jury must *acquit* (i.e., if the prosecutor does not prove every element beyond a reasonable doubt). CJI2d 3.2(2).[5]

Ultimately, however, we are not persuaded that reversal is required. First, the issue is unpreserved and the burden on defendant is higher to show that reversal is appropriate. Second, while use of the standard criminal jury instructions is preferable, it is not required. The instructional problems in this case would not have arisen had the trial judge utilized the standard instructions. Nonetheless, we are not persuaded that defendant was actually prejudiced by the instruction and, therefore, we decline to reverse.

First, we note that this case involves an issue of unpreserved error, not a harmless error analysis of preserved error.[6] Applying the three-part test under *Carines, supra*, there is little doubt that defendant established the first two parts. As discussed above, we agree that there was instructional error and that the error was plain. However, we are not persuaded that defendant has met his burden with respect to the third prong, that he was prejudiced by the error.

(…continued)

"reasonable doubt." *Id.*

[5] Indeed, the standard instruction does not use the term "duty," but instead employs the plain-English phrase "you must find the defendant not guilty." CJI2d 3.2(2).

[6] The dissent, we believe, mistakenly relies on *People v Duncan*, 462 Mich 47; 610 NW2d 551 (2000), and incorrectly blurs the distinction between the plain error analysis and the harmless error analysis. Although *Duncan* was originally held in abeyance for the decision in *Carines, supra*, ultimately *Duncan* was decided on the basis of harmless error, not plain error. *Duncan, supra* at 57. Furthermore, while *Duncan* does make the statement that a structural error requires reversal, it does so only in the context of the harmless error discussion. *Id*. at 51. *Duncan* does not state that a structural error requires reversal under a plain error analysis. Indeed, in the Supreme Court's summary in *Carines, supra* at 774, structural error is discussed in the context of a harmless error analysis for preserved, constitutional error, but is not mentioned in regards to forfeited error under a plain error analysis.

The Supreme Court in *Carines* did note that there may be a special category of cases, as yet undefined, for which prejudice may be presumed. *Id*. at 763 n 8, citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993). However, it is speculative at best at this point to conclude that the Supreme Court will determine that such a special category of cases exists and equate it with those involving structural error. See *Duncan, supra* at 60 n 3 (Corrigan, J., dissenting) (unclear if all cases of structural error requiring reversal under a harmless error analysis would require reversal under a plain error analysis).

Finally, it is not entirely clear if this case does present an example of structural error. While a misdefinition of "reasonable doubt" has been classified as such, *Sullivan v Louisiana*, 508 US 275; 1135 S Ct 2078; 124 L Ed 2d 182 (1993), as discussed *infra*, the case at bar is somewhat different in that it involves a correct definition of reasonable doubt coupled with an incorrect one. In any event, we do not believe it necessary to resolve the question whether this presents an example of structural error.

We initially note that the trial court's instructions included an appropriate definition of reasonable doubt. That is, we would not have difficulty in concluding that the jury had been adequately instructed on reasonable doubt had the trial court simply not included the problematic language. It is the addition of the language referring to the jury having to have a reason for its doubt and that the jury had a duty to convict if they did not have a reasonable doubt where the error lies. Thus, this is not a simple case of the jury being improperly instructed on reasonable doubt. Rather, this case presents the more complicated issue of the jury being properly instructed on reasonable doubt, with the jury being given additional, improper instructions.

Next, at least with respect to the "duty to convict" portion of the instructions, those instructions do not create the possibility of conviction where the jury did possess a reasonable doubt.[7] That is, while a "duty to convict" instruction is disfavored, the instruction here does not raise the possibility that the jury would convict despite having a reasonable doubt. Rather, it raises the possibility that the jury may have convicted despite having an *unreasonable* doubt. Thus, this case does not present a situation, as in *Sullivan v Louisiana*, 508 US 275; 113 S Ct 2078; 124 L Ed 2d 182 (1993), wherein the defective reasonable doubt instruction would have allowed for the jury to convict even though there did exist a reasonable doubt as properly defined.

Finally, the jury convicted of the lesser offense of second-degree murder, acquitting defendant of first-degree murder. Apparently, the jury did have a reasonable doubt as to defendant's mens rea and, therefore, acquitted on the greater charge. This fact reflects the jury's ability to apply the proper definition of "reasonable doubt" as provided by the trial court.

For these reasons, we are not persuaded that defendant has met his burden of persuasion with respect to demonstrating prejudice. *Carines, supra* at 763. In any event, even if defendant can demonstrate prejudice, reversal is warranted only if the plain error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity or public reputation of the proceedings. *Id.* Here, there is no showing that defendant is actually innocent. Furthermore, we are not persuaded that the fairness, integrity or public reputation of the proceedings are seriously affected. As noted above, a correct definition of "reasonable doubt" was contained in the trial court's instructions and the jury's willingness to convict on the lesser offense demonstrates that they were not unduly affected by the improper portion of the trial court's instructions. In our view, this far outweighs the rather speculative prospect that all twelve jurors possessed a reasonable doubt as to defendant's guilt on the lesser offense but could not articulate a reason for that doubt and therefore convicted or that the juror, although feeling no duty to convict on first-degree murder, nevertheless felt a duty to convict on second-degree murder despite having an unreasonable doubt.

VII. Failure to Instruct on Manslaughter

Defendant argues that the trial court erred by denying his request to instruct the jury on manslaughter as a lesser offense to the charged offense of first-degree murder. Manslaughter is a cognate offense to murder. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991).

[7] Arguably this is not the case with respect to the portion of the instructions which told the jury they must have a reason for their doubt. In such case, it is theoretically possible, though perhaps not realistic, that a juror may have had a reasonable doubt, but nevertheless voted to convict because that juror could not articulate a reason for his doubt.

Under *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), defendant was not entitled to an instruction on lesser cognate offenses.

VIII. Jury Instruction on Alternative Defense of Self-defense

Defendant argues the trial court should have given his requested instruction on self-defense. We disagree. The trial court is required to instruct the jury on a defense if there is evidence to support the instruction. *People v Lemons*, 454 Mich 234, 242-252; 562 NW2d 447 (1997). Here, defendant presented an alibi defense. There was no evidence to establish that he acted in self-defense. Accordingly, the court did not err by declining defendant's requested instruction.

IX. Sentencing Guidelines Scoring Issues

In a motion for resentencing, defendant challenged the scoring of various offense variables. The prosecutor conceded the scoring issue at the hearing. The sentencing judge, however, indicated that, even under a rescored guidelines, he would still sentence defendant to life in prison and, therefore, denied resentencing. A trial judge may deny resentencing where the same sentence would be imposed even under the corrected scoring. See *People v Cheesebro*, 206 Mich App 468, 474; 522 NW2d 677 (1994).

Defendant also argues that he is entitled to resentencing because his life sentence is disproportionate. However, even under the corrected guidelines scoring, a life sentence was within guidelines. Accordingly, defendant is not entitled to appellate relief. MCL 769.34(10); *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000).

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy